No. 14,813

IN THE

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

MARY V. HEAVINGHAM, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased,
Appellee.

APPELLEE'S BRIEF.

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STATEMENT OF THE CASE.

We are at a loss to know what the appellant expects to gain by this appeal.

The husband and father, a lifetime railroad employee, was killed through the negligence of his employer.

He was a conductor, 56 years of age, earning in excess of $5700 annually. His widow, 50 years of age, and his minor daughter, 10 years of age, were given by the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, the right to recover the damages they sustained by reason of his death.

The appellant by its answer admitted its liability therefor.

Unless the widow and daughter were required to yield to the dictates of the employer, the wrongdoer, they could only proceed by the one method provided them by law of obtaining redress—by instituting a lawsuit.

This they did.

A Court and jury awarded them a modest sum: $75,000.

The sole claim on this appeal is that this was too much because the jury awarded damages for an item—conscious pain and suffering—which they had no right to consider. It is said the trial Court should not have submitted that issue and indeed should have given appellant's requested instruction affirmatively eliminating it from the consideration of the jury.

The verdict of the jury was general.

There is no way by which it can be established that the jury allowed *anything* for conscious pain and suffering.

To give color to its claim, appellant is obliged to pretend, and this it does variously by assumption, by speculation, and even by flat assertion, that the proof of the loss to the widow and daughter is not sufficient in itself to sustain the award of $75,000 (why appellant does not rest its appeal on this claim alone is interesting), that an award of a sum sufficient to eke out the difference was made for conscious pain and

suffering, and that since the amount so awarded is unascertainable, the general verdict and judgment are vulnerable.

Anyone at all familiar with awards in death cases of this class will recognize at a glance the propriety of the jury's action in thus awarding such a sum—conservative it is true—but one still fair to both parties.

The decisions of this Court, of the Supreme Court, and of the Courts of California, establish that this award was just and proper.

In addition, these decisions reject the precise claims made here by this same appellant, through its present counsel, in other like cases in the past.

Furthermore, very recent decisions of this Court and of the Supreme Court specifically and categorically reject the contentions now made by the appellant here.

All these decisions, except those, of course, which were rendered since the motion for new trial herein was heard, were fully presented upon the trial of this case and the hearing of the motion for new trial by the appellee in extended written briefs, and on both occasions the trial Court fully and carefully considered and denied these exact claims.

Significantly, appellant on those occasions presented none of these decisions to the trial Court and has chosen to ignore them here.

It is manifest that whatever its present success, the appellant, because of its admission of liability for

the damages sustained by the widow and daughter, must inevitably, in the long run, pay them. It can hope at best then to only win a battle, for it has already lost the war.

It seems to us that what the appellant is seeking here, is, in the circumstances, inexplainable on any theory consistent with propriety. It of course is to be noted (deceased was killed on February 24, 1954) that appellant has already succeeded in delaying the widow's and child's use of that which is due them for a period of 10 months.

We cannot imagine that the appellant here will run counter to the language of the late Justice Jackson of the Supreme Court in *Miles v. Illinois Cent. R. Co.* (1942) 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, 146 A.L.R. 1104, and hide "behind a rather fantastic fiction that a widow is harassing the Illinois Central Railroad".

The nature of appellant's claims, made in the teeth of the decisions so completely refuting them, presents, we think, in a death case of conceded liability for substantial damages, a rather startling picture.

This we shall show under the headings:

I. The Jury's Award of $75,000 Damages is Not Only Warranted by the Record but it is in the Circumstances a Modest One.

and

II. Recovery for Conscious Pain and Suffering Was a Submissible Issue Upon the Record and the Jury Was Entitled to Award a Substantial Sum

Therefor, But Even Though That Issue was not Submissible, That Fact in no Wise Renders the General Verdict Vulnerable to Attack.

If any of these several propositions are sustainable, then this appeal must necessarily fail.

I.

THE JURY'S AWARD OF $75,000 DAMAGES IS NOT ONLY WARRANTED BY THE RECORD BUT IT IS IN THE CIRCUMSTANCES A MODEST ONE.

There are certain guides laid down by the U. S. Supreme Court which govern the award here, not only because this is a death case under the Federal Employers' Liability Act but because it is a suit to be weighed under the principles peculiarly applicable to cases arising under that Act.

These principles and the facts to which they are applicable include:

(a) The jury is the tribunal to determine the issues, and any departure from such a course is "taking away a great *portion of the relief which Congress has afforded them (railroad employees)*".

Bailey v. Central Vermont Ry. (1943) 319 U.S. 350, 63 S.Ct. 1062, 1064, 67 L.Ed. 1944;

Tennant v. Peoria & P. U. Ry. Co. (1944) 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520;

Blair v. Baltimore & O. R. Co. (1945) 323 U.S. 600, 65 S.Ct. 545;

Lavender v. Kurn (1946) 327 U.S. 645, 66 S.Ct. 740;

Ellis v. Union Pac. R. Co. (1947) 329 U.S. 649, 67 S.Ct. 598;

Wilkerson v. McCarthy (1949) 336 U.S. 53, 69 S.Ct. 413.

(b) The "court must consider extent of plaintiff's injuries, his education, station in life, and character, and *must view evidence as to damages most favorable to plaintiff* in light of rule that amount *of damages is primarily for jury.*"

Affolder v. New York C. & St. L. R. Co. (D.C. Mo. 1948) 79 F.Supp. 365;

Malone v. Suburban Transit Co. (D.C. S.C. 1946) 64 F. Supp. 859 (affirmed 156 F.2d 422).

The cost of an annuity in a responsible life insurance company (*Estabrook v. Butte, Anaconda & Pacific Ry. Co.* (9 Cir. 1947) 163 F.2d 781) such as the Metropolitan at $10 per month would be $2,148.18; at $400 per month the figure is $85,920.

Also, the present value to provide $1 per month for 16.05 years at an annual interest rate of 2½% is $158.65. (TR 82, 83.) To provide $400 per month, you reach the figure of $63,460 resulting from a multiplication of the base figure of $158.85 by $400. (TR 83-85.)

Thus, without any resort to damages for conscious pain and suffering, it is apparent that the jury could

well have found on strictly dollars and cents loss alone, the sum of $85,920. Appellant in its calculations both in the trial Court and upon this appeal carefully avoids any recognition of the sum the jury could have awarded to Kathleen Heavingham for the loss "of her father's care". An award of the sum of $25,000 for this item was permissible.

Miller v. Southern Pacific Co. (1953) 117 Cal. App. 2d 492, 256 P. 2d 603, cert. den. 346 U.S. 909, 74 S.Ct. 239;

Thomas v. Conemaugh Black Lick Railroad (DC 1955 Pa.) 133 F. Supp. 533.

In *Miller v. Southern Pacific Co.* supra, the Court held that an award of $20,000 to the children "for the loss of their father's care, attention, instruction, training, advice and guidance" was proper.

The appellant concedes that decedent's gross earnings for the year 1952 were $5,722.01. In 1953, $5,574.34. (p. 9 Appellant's brief.)

Appellant labors to reduce these earnings by various methods and claims, including the assumption that the decedent spent on himself $100 per month. (p. 16 Appellant's brief.)

It should be noted that the appellant arrives at this assumption directly contrary to the testimony of the widow which he cites that "Appellee testified she did not believe decedent's expenses amounted to $100 per month". (p. 10 Appellant's brief.) Yet, appellant transforms her denial by the simple expedient of assertion into an admission that these expenses did

amount to $100 per month. The actual proof is as stated and the detail of it is the following:

Mary V. Heavingham, special administratrix and the widow testified:

"Q. Who handled his pay checks?

A. Well, he brought it home and we usually went together and cashed it.

Q. And what was it devoted to, the proceeds?

A. Well, most of it went to the home, the family." (TR 99.)

* * * * * * *

"Q. And I believe you stated, Mrs. Heavingham, that your husband ordinarily would bring his check home and you would cash it together, is that right?

A. Yes.

Q. And then he would take from the bank, I presume, whatever he required for his personal expenses, is that right?

A. Well, he would always ask me for what money he needed.

Q. I see. But he did take sums of money for his own personal expenses such as meals, clothing, and that type of thing, is that right?

A. That's right.

Q. And would you say that that sum of money would average, say, a hundred dollars a month?

A. I don't think so. I never kept track of it, but I don't think he ever——

Q. Could it have averaged a hundred dollars a month?

A. Well, I don't think it would be that much.

* * * * * * *

Q. So that we are clear on this, Mrs. Heavingham, the expense Mr. Heavingham did draw

on occasion, regularly, were sums of money for his own use, personal use, is that correct?

A. Well, I always gave it to him, whatever he asked.

Q. And out of the balance you ran the house, is that correct?

A. Yes.

Q. And provided the food for the family?

A. Yes.

Q. And I suppose both he and you bought the clothing for him, is that right?

A. That's right.

* * * * * * *

Q. While I appreciate you can't give us figures and Mr. Martin understood that in his questions, I want to ask you in the light of his own questions, would you say that practically everything your husband made went for yourself and your family?

A. Just about." (TR 102, 112, 113, 114.)

We shall not take the time and space to deal extensively with appellant's erroneous assumptions and calculations in its brief.

Suffice it to say, these and the methods employed are exactly the same as those used by it in *Miller v. Southern Pac. Co.* supra wherein they were both condemned and rejected.

In the *Miller* case the Court said:

"Our use of defendant's breakdown and analysis of the lump sum award is no indication that we deem it legally proper to make the various assumptions involved; e.g., the assumption that the jury awarded $20,000 for Miller's pain and

> suffering and $60,032.50 for the support of his widow and children. We have used that method and those figures merely by way of illustration and as a convenient vehicle of discussion supplied by the defendant." 256 P. 2d 603, 613.

It is to be noted that the defendant there, as here, made flat assumptions as to what the items of damage were and even then in that connection failed as here to make allowance to Kathleen Heavingham for the loss of "her father's care", whereas the Court in the *Miller* case in rejecting appellant's claims, held that the jury could have awarded the sum of $20,000 "to Miller's children for the loss of their father's care, etc." (p. 613.)

Other grave errors entering into appellant's assumptions and methods include the following:

Appellant claims, at page 15 of its brief, that any financial contributions to his dependents would have to come from decedent's take-home pay. For this proposition it cites *Wetherbee v. Elgin, Joliette & Eastern Ry. Co.*

This same claim upon the same authority, and it is to be observed that this is the sole authority appellant relies upon for this astounding proposition, was made to the District Court of Appeal in the *Miller* case in its opening brief. The claim was made that the *Wetherbee* case was decisive of the issue in the *Miller* case.

The District Court of Appeal, in rejecting this contention, found it unnecessary to even refer to the

Wetherbee case. Furthermore, the Supreme Court, by its denial of certiorari, confirmed that the *Wetherbee* case was wrong.

It should be here noted that what the Court in the *Wetherbee* case attempted to do and what this defendant in the *Miller* case and in this case seeks to do are rejected out of hand by the most recent decision of the Supreme Court. In *Southern Railway Co. v. Neese* (4 Cir. 1954) 216 F. 2d 772, there was an award in an FELA case of $60,000 for the death of an unmarried 22-year-old railroad car inspector. His annual income was $2180 and he lived with his mother and father, to whom he allegedly contributed $30 or $40 per month.

The trial Court, on motion for new trial, required a remittitur of the sum of $10,000 and judgment was entered for $50,000. On its appeal the railroad company, like the appellant here, upon authority of the *Wetherbee* case, claimed that the evidence of decedent's "take-home pay" did not sustain the award made and that the judgment should be reversed.

There, as here, appellant submitted involved calculations upon various assumptions. The Court of Appeals agreed with the appellant. It indicated that the jury used "a fantastic assumption" in making the award. (p. 775.)

It harshly concluded "even under the most unreasonable expectations voiced by the parents, it is not necessary that a fund of $50,000 be provided by Southern."

It uses the measure of "take-home pay" in ascertaining what an annual yield from decedent's earnings would be.

It says:

> "A total contribution of $50,000.00 by young Neese to his parents, had he and they lived out their normal expectancies, seems to us far beyond the pale of any reasonable probability and entirely without support in the record. See Wetherbee v. Elgin, J. & E. R. Co., 7 Cir., 191 F. 2d 302; Virginian R. Co. v. Armentrout, 4 Cir., 166 F. 2d 400; 4 A.L.R. 2d 1064; Cobb v. Lepisto, 9 Cir., 6 F. 2d 128; Sheehan v. New York, N. H. and H. R. Co., D.C., 18 F. Supp. 635, 637."

It concludes that the sum of $50,000 damages for the death of this son "is without support in the record". It says:

> "The judgment appealed from will accordingly be affirmed in so far as it adjudges liability on the part of defendant for Neese's death but will be reversed for failure of the judge to set aside the verdict as to damages, *which is without support in the record even as to the amount to which it has been reduced,* and the case will be remanded for a new trial confined to the issue of damages."

On November 22 of this year after Appellant's brief was served, the Supreme Court of the United States, 76 S.Ct. 131, in a per curiam decision, reversed out of hand this decision of the Court of Appeals, saying:

> "For apart from that question, as we view the evidence we think that the action of the trial court was not without support in the record, and

> accordingly that its action should not have been disturbed by the Court of Appeals."

Frankly, in the circumstances of this appeal, we felt the necessity of directing Appellant's attention to this decision as dispositive of this appeal. With the same purpose, we called Appellant's attention to the decisions of the Supreme Court hereinafter reviewed in *Snyder v. U.S.* (4 Cir. 1954) (D.C. Md.) 118 F. Supp. 585, 218 F. 2d 266, and *U.S. v. Union Trust Co.* and *Union Trust Co. v. Eastern Air Lines, Inc.* (1953) 113 F. Supp. 80 (D.C. Cir. 1955), 221 F. 2d 62, and handed down December 5, 1955.

The first two were Federal Tort Claims Act cases.

In the *Snyder* case, a government bomber crashed into a house, causing death to three persons and serious injuries to three others. The trial Court found that the government was liable and that the widow and minor children were entitled to recover for the death of a husband and father the sum of $131,250 damages.

The Circuit Court of Appeals, in its decision 218 F. 2d 266, reversed this award and reduced the sum allowable to $87,500. It said at page 268:

> "We think that this award, which was more than twice as much as any award in the State of Maryland on account of wrongful death, was clearly erroneous."

It reviews decedent's earnings and the character of his business.

It said further:

> "Life expectancy, earnings and contribution to family support in a case such as this are largely a matter of speculation; but on the whole record we do not think that an award of more than $87,500 for the death of Mr. Guyer can be justified."

The United States Supreme Court, summarily reversing the Circuit Court of Appeals and reinstating the judgment of the trial Court, in a per curiam decision, stated:

> "The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed and the judgment of the District Court reinstated."

In *Union Trust Co. of District of Columbia v. United States,* and the companion case of *Union Trust Co. v. Eastern Air Lines, Inc.,* supra, a Tort Claims suit was brought against the government and an action was likewise brought against the airplane company in which they were passengers for the wrongful death of a husband and wife, in collision with another plane.

The trial Court under the Tort Claims Act found against the government and concurred in the jury's verdict against the Air Line Company of $50,000 for the death of the husband and $15,000 for the death of the wife.

The Court of Appeals for the District of Columbia in its decision, 221 F. 2d 62, supra, concluded that

the evidence was insufficient to sustain the judgment against the Air Lines but held that it was sufficient as against the United States except that the awards for damages would have to be reduced to conform to the limits for the death of one person under the Law of Virginia which is $15,000.

In *U. S. v. Union Trust Co.,* the Supreme Court in a per curiam decision said:

> "The petition for writ of certiorari is granted and the judgment is affirmed."

In the companion case of *Union Trust Co. v. Eastern Air Lines, Inc.,* in a further per curiam decision, the Court said:

> "The petition for writ of certiorari is granted and the judgment is reversed."

Of course, there is an additional vice which is inherently, though not expressly, condemned by the foregoing review and which undermines the very basis of appellant's calculations. This vice is the assumption that "take-home pay", no matter what items were deducted from the pay check, is the extreme limit of the sum which the jury could use to find the pecuniary loss to the widow and daughter.

Such an assumption is wrong because (1) income tax deductions are not in a personal injury case rightfully deductible from earnings of either an injured person or one deceased in determining what his actual earnings were, (2) the deductions might well include in a given instance what is actually the creation of an asset for the benefit of a family, and

(3) earning capacity and not mere pay check after deductions is the measure of the "pecuniary contributions" which furnishes the basis for the jury's determination as to what might have been contributed to the family.

As to (1), it is interesting to observe how often in the trial Courts, state and federal, the appellant has been able to create confusion by a claim that an injured person's loss of wages is to be measured by pay check less income tax deductions.

Strangely enough, the appellant uses the language of this Court in *Southern Pac. Co. v. Guthrie* (9 Cir. 1949) 180 F. 2d 295 (1951) 186 F. 2d 926, cert. den. (1951) 341 U.S. 904, 71 S.Ct. 614, 95 L.Ed. 1343, wherein it is said (p. 927):

> "We also considered that calculation should be based on no more than $6000 a year, because of necessary tax deductions. *We think the court's view that the net take home pay, after taxes, would represent the actual loss, is correct; but we are now convinced that we cannot tell how much this would be.* Under the tax law then in force, he could look forward to an additional exemption after age 65, and because he was married, the split income features of the law would give two additional exemptions when his wife reached 65, something about which we cannot tell. All we do know is that in 1946, his income tax on $5,165.92 was $724 less a 'rebate' of 'around $200'.
>
> "In the nature of such a case there is bound to be some uncertainty, even as to such pecuniary matters as future earnings. What Guthrie's ultimate earnings, net or gross, would be, cannot be

> foretold. While it may be prophesied that during his lifetime income taxes will continue, there is not equal certainty as to their impact on him. In Chicago & N. W. Ry. Co. v. Curl, 8 Cir., 178 F. 2d 497, 502, the court held it not prejudicial error to refuse evidence of the amount of income tax and other deductions, because of the inherent uncertainty in such matters, saying, 'We may assume that the jury were aware of * * * the fact that the average earnings, net or gross, of the appellee for the future could not be definitely known'." (Emphasis added.)

The fact is there is no warrant for the deduction of income taxes in this respect.

In *Chicago & N. W. Ry. Co. v. Curl* (8 Cir. 1949) 178 F. 2d 497, it was also said (p. 502):

> "The actuary who testified for appellee based his computations on appellee's average gross income for several years prior to the action, and the court refused to receive appellant's offer of proof of appellee's average net earnings after deductions. Appellant offers no authority in support of this contention. But see and compare Stokes v. United States, 2 Cir., 144 F. 2d 82, 87; Cole v. Chicago, St. P., M. & O. Ry. Co., D.C., 59 F. Supp. 443, 445; Majestic v. Louisville & N. R. Co., 6 Cir., 147 F. 2d 621, 626-627. We conclude that there was no prejudicial error in the court's refusal to accept appellant's offer of proof."

In *Cole v. Chicago, St. P., M. & O. Ry. Co.* (D.C. Minn. 1945) 59 F. Supp. 443, the Court quoted with approval from *Advance v. Thompson,* 320 Ill. App. 406, 51 N.E. 2d 334, 341, saying (p. 445):

"In the case last cited the court said: 'As a court of appeals, in passing upon the question of alleged excessive damages, we can neither speculate nor conjecture as to how plaintiff's financial status might be affected in the future by business booms or depressions; by the uncertainties of the labor situation after the war, or how his earnings might be affected by his expenses away from home, taxes, work clothing, union dues, social security and old age pension. We assume that the jury took these matters into consideration in arriving at their verdict and that the trial court did the same in entering the remittitur. Nor can we in a personal injury case reduce the amount of the verdict to a matter of mathematical computation. De Fillippi v. Spring Valley Coal Co., 202 Ill. App. 61. Nor can we compute the earning capacity of the amount awarded plaintiff at any given rate of interest. Apparently counsel for defendant expects this court to do all this. We do not find it within our province to do so.'

"While this quotation relates to the duty of the appellate court, it is applicable here."

In *O'Donnell v. Great Northern Ry. Co.* (D.C. Calif. 1951), U. S. District Judge Rubey Hulen, sustaining an award of $65,000 for personal injuries, said:

"There is no authority for deducting income tax at an estimated liability, in determining present value of future earnings. The jury was not so instructed. Defendant requested the Court to so instruct. No exception was taken to the refusal of the instruction."

In addition to these authorities there are collected the cases dealing with the subject in 9 A.L.R. 2d 320.

This annotation purports to collect all of the reported cases in the United States, England, Scotland and Canada. In no case reviewed was income tax liability permitted to be considered in determining damages for loss of earning capacity. The manifest reason for not including income tax deductions in measuring the adequacy of an award for personal injuries is well stated in *Billingham v. Hughes* (1949) 1 K.B. 643, 9 A.L.R. 2d 311. Lord Justice Singleton said (p. 318):

> "Though the principle has always been to seek to arrive at the pecuniary loss of the individual, the practice in the courts of this country has consistently been not to have regard to income tax in the assessment of damages; and to alter the practice now would lead to great confusion, and would add immeasurably to the difficulty of assessing damages and in the direction to be given to a jury. Consider the cases of four different men each earning 2,000£ a year. A has no other income but has a wife and young children. B is a bachelor with an investment income of 2,000£ a year. C has a farm on which he makes a loss of 500£ a year which can be set off against his other income for tax purposes. D by covenant or otherwise has disposed of half his income. If each of those four men is injured and away from work for a year, is the assessment of pecuniary loss to be on a different basis in each case because the amount of tax payable by each on his earned income differs? A man's income is his own and he can do with it what he likes. Income tax is a charge on the person, and not on property or gains; * * *."

It was no doubt the reasoning set forth in these cases that caused the Court to say in *Stokes v. United States* (2 Cir. 1944) 144 F. 2d 82, 87:

> "We see no error in the refusal to make a deduction for income taxes in the estimate of libelant's expected earnings; such deductions are too conjectural."

In *Smith v. Pennsylvania R. Co.* (Ohio, 1950) 99 N.E. 2d 501, wherein a verdict in a death case was sustained, the Court said:

> "We hold that it is not proper to deduct from the annual income of plaintiff's decedent Federal Income Taxes in determining the amount which the decedent would have contributed to his wife and children had he lived. Such taxes are too speculative to be considered by the jury. Stokes v. U. S., 2 Cir., 144 F. 2d 82; Chicago & N. W. R. Co. v. Curl, 8 Cir., 178 F. 2d 497. While the verdict is larger than usual we find no basis for a conclusion that the verdict is so excessive that it appears to have been given under the influence of passion or prejudice. There is no factual basis to support this charge."

It is passing strange, if there were the slightest basis for appellant's contention in this respect, that the Courts in the cases elsewhere reviewed, wherein the awards covered a wide range, failed to apply the rule contended for by appellant, and, indeed, counsel, including attorneys for the appellant here, forgot to mention the subject.

As to the second reason, it is self evident that the deductions might well include in a given instance

what is actually the creation of an asset for the benefit of a family.

The language of the cases is that the cause of action is not for damages measured by "take home pay" but rather, as stated by the appellant itself at page 14 of its brief, for damages consisting of "compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased".

The difference between "pecuniary benefits" and a pay check is as glaring as between a pay check and earning capacity.

Earning capacity and pecuniary benefits here are synonymous.

That earning capacity and not pay check is the measure in these cases is established by *Hosman v. Southern Pac. Co.* (1938) 28 Cal. App. 2d 621, 83 P. 2d 88, cert. den. 306 U.S. 656, 59 S.Ct. 645, 83 Law. Ed. 1054; *Ostertag v. Bethlehem Shipbuilding Corp.* (1944) 65 Cal. App. 2d 795, 151 P. 2d 647; *Foster v. Pestana* (1947) 77 Cal. App. 2d 885, 177 P. 2d 54.

What was the pecuniary loss, and presently we are only referring to dollars and cents, to the widow and daughter as measured by decedent's earning capacity?

It was manifestly not limited to a consideration of the "take home pay" of the decedent at the date of his death. It must be based upon whatever the record and the inferences to be drawn from it indicate the earning capacity and the contributions therefrom would ultimately be.

Appellant endeavors to freeze the entire matter by concluding that the deceased would not have worked to the end of his life expectancy. We pause momentarily to inquire, how does the appellant know what at the longest the decedent would have lived and worked?

It claims that evidence introduced by it and received over appellee's objection to the effect that "the average age of retirement of trainmen such as decedent is between 66 and 67", is conclusive. It cites no authority to this effect. Indeed, if there ever was a good reason why an individual person should not become a statistic measurable by mathematics, it is present in a case of this kind.

This proposition is at once established by the instruction regarding mortality tables and the principle that the tables are neither binding nor conclusive and that the jury may find that an individual person upon the record might live a shorter or longer period than that set forth in the tables.

Here we have undisputed evidence of the outstanding physique of the husband and father.

He was a plasterer; he was a hod-carrier, a strong man. (TR 97.) His health was very good. (TR 98.) Photographs of him were received in evidence.

Furthermore, as is the character of the railroad business, Heavingham's increased seniority with the passing of time to the end of his period of service would ever improve. (TR 98, 102, 103.) It was "a continuing up-grade thing in relation to both the kind

of run he could hold and the kind of money he could earn up to the time of his death. (TR 102, 103.) Indeed, the Court has a right to take judicial notice of this. *Patton v. Baltimore & O. R. Co.* (D.C. Pa. 1953) 120 F. Supp. 659, 666, 667, 197 Fed. 2d 733, 214 Fed. 2d 129.

With this in mind it is readily apparent that on an ever increasing scale of earnings, with passing time decedent's gross earnings might have been $10,000 or $12,000 a year.

Indeed, the press carries a recent story (since the trial of this case) of a railroad conductor who died a millionaire.

This was Walter W. Bradford, and the publication was in the San Mateo, California, Times of March 4, 1955 under the caption "Million Left by Retired SP Conductor."

The issue of Labor of April 2, 1955 carries the names of three railroad men in their eighties as still active. They are Irving Witherspoon, 85 on March 17 of this year, a passenger conductor of Fort Worth, Texas, Maxey Callaway, 83, a passenger conductor on the Gulf, Colorado and Santa Fe, and A. L. Beers, 81, who "still regularly mounts the cab of a big diesel as an engineer on the Milwaukee Road's run between Austin, Minn., and LaCrosse, Wis."

In addition, there is William Braney, a conductor on the Boston and Maine, who was still running a train at the age of 81 at the time of trial.

At the time of the preparation of this brief the San Francisco Examiner carried a photograph and a story of Ex-Railroader William Perry. After stating that Perry is now 103 years old, the item in part stated:

> "He was born in 1852 in Oklahoma Indian Territory and in the 1880's drove a horse car here. Later he switched to railroads and was retired from the Southern Pacific Bayshore yards in 1929 at 76.
>
> " 'He's full of pep and, thank the Lord, his mind is as clear as a bell', Mrs. Mowatt said admiringly."

It is manifest that appellant's efforts to determine for itself under the guise of analysis and computation what the jury could and did award is only an attempt to arrogate to itself the rights and duties of the fact finding body, the jury.

Its splitting up of the sum awarded by the general verdict into items of damages, its claims of take-home pay and the earning capacity on which pecuniary losses may be based, is arbitrary, without basis in the record, and fails to establish that the jury was not entitled to award without resort to "conscious pain and suffering" the full $75,000.

Indeed, a very recent decision of this Court precisely in point affirmatively establishes that the jury had the right to so award that sum and that its award cannot be disturbed on this appeal.

In *Boise Payette Lumber Co. v. Larson* (9 Cir. 1954) 214 F. 2d 373, there was an award of $75,000 to

the widow and an *afterborn* son. The husband made $450 per month, or between $5,000 and $6,000 a year.

There was no proof of the take-home pay nor of the reduction of earnings by deductions for income tax and other things.

Neither was take-home pay nor the formula sought to be applied by appellant here in any wise recognized.

Affirming plaintiff's judgment, this Court, speaking through Circuit Judge Chambers, said:

> "Appellant takes exception to the size of the verdict, in the amount of $75,000. Plaintiff testified that her husband's earnings were between $5,000 and $6,000 a year; that her husband was making $450 per month. The burden of a portion of appellant's argument seems to be that the appellee should have given evidence of the decedent's earnings over some considerable years and evidence that there was some probability his employment was apt to be stable. * * * As it was, without more, the jury was entitled to assume that the decedent was a $450 a month man and take that factor into consideration, among other factors, in assessing the damages of Mrs. Larsen and the infant.
>
> * * * * * * *
>
> "Of course, the damages were not alone to Mrs. Larsen, but also to the child.
>
> * * * * * * *
>
> "The testimony shows that the decedent was generally sober and industrious, that he was in good health and that his death was a heavy loss to the wife and to the afterborn son, not only from a financial standpoint but from the aspect of his society, which seems to be compensable in

Idaho. Idaho Code, 1947 Ed., § 5-311. A motion was made for a new trial, and among the grounds therefor was the one that the verdict is excessive and appeared to have been given under the influence of passion or prejudice and that the verdict bears no reasonable relation to the amount of damages sustained. The trial court does have a wide latitude in granting a motion for new trial, and had the trial court granted such a motion upon the ground that it thought the verdict high, it might have been within its range of authority. *That question is not here for decision.*

"It is the opinion of this court, while $75,000 is quite a lot of money, that a verdict for such an amount here is not monstrous, shocking or outrageous. Cf. Southern Pacific Co. v. Guthrie, 9 Cir. 186 F. 2d 926. This court, in a recent case, Baldwin v. Warwick, 9 Cir., 213 F. 2d 485, has assumed to interfere with a verdict of $50,000 in punitive damages where two gamblers, upon the verdict of a jury, must have been found to have given their victim a bad weekend from drugged drinks. *Yet the Baldwin case is not authority to meddle in a wrongful death case where the life of a young, industrious, intelligent, reasonably successful young man has been taken from his dependents.* 214 F. 2d 373 at 380." (Emphasis added.)

The sums paid in settlement by this appellant in other death actions speak eloquently here. They reveal that this appellant has *in settlement* paid as large or larger sums than that awarded by the jury in this case.

Payments so made by this defendant include the following:

There is reported in the issue of "Labor" of April 30, 1954 a settlement made by this defendant, after two days of trial, for $75,500. This was for the death of a brakeman and for the benefit of his surviving wife and children. It was reported that this was "the largest ever made in this territory." The territory was Salt Lake City, Utah.

In *Miller v. Southern Pac. Co.,* supra, plaintiff recovered and the appellant paid $80,032.50 for the death of a brakeman with earnings of $4,200 a year and a wife and children.

In *Ginn v. Southern Pacific Co.,* number 31185 in the trial Court, this appellant, through the same firm of attorneys representing the appellant, before trial on July 22, 1953 paid the surviving widow upon stipulated judgment the sum of $50,000 for injuries resulting in death sustained by him on December 27, 1951. In that case liability was disputed. There were no children. Plaintiff's decedent was a freight train brakeman and conductor. He was nearly 56 years of age at the time of his accident and death. The widow was nearly 47 years of age. She was married to decedent for a period of something less than nine years. Plaintiff's death was instantaneous. He was knocked from his position from the top of a freight car to the rail below.

In *Tastor v. United States* (1954) 124 F. Supp. 584, Judge Oliver Carter allowed the widow and the nine-

teen month old son the sum of $68,000. There was no conscious pain and suffering.

In the case of *Betts v. Southern Pacific Co.,* number 126684-H, on earnings of $300 per month, Judge Harris awarded, and the appellant paid, $57,000. On the basis of $460 per month earnings, Judge Harris would have awarded $85,500. This does not take into account the lesser earning power of money as of that date.

In *Stone v. Southern Pacific Co.* (1951) Santa Clara County Superior Court number 76,523, plaintiff's widow and two children were awarded $90,000 for the death of a 26 year old car inspector.

Verdicts returned and judgments paid by this appellant and defendants in other cases include the following:

In *Buck v. Pac. Greyhound Lines* (Jan. 14, 1952) Superior Court, San Francisco, number 399,897, a verdict of $200,000 for the death of a man capable of earning $10,000 a year was returned.

In *Ze Layeta v. Pac. Greyhound Lines* (1949) Superior Court, San Francisco, number 359,798, a widow and fourteen year old child were awarded for wrongful death the sum of $75,000.

In *New York, N. H. & H. R. Co. v. Zermant* (1 Cir., 1952) 345 U.S. 917, 200 F. 2d 240, cert. den. 73 S. Ct. 729, 97 L.Ed. 1351, an award of $116,500 for death of 39 year old brakeman who earned $5,406.56 for a year prior to his death and who is survived by 31

year old widow and by four children under four years of age, and a fifth who was born posthumously.

In *Smith v. Pa. R. Co.,* 99 N.E. 2d 501, a verdict for $100,000 for the death of a yard conductor was affirmed.

In *Gall v. Union Ice Company,* Superior Court, Santa Clara County, number 68801, a verdict for $100,000 was affirmed.

In *Naylor v. Isthmian S. S. Co.* (D.C. N.Y. 1950) 94 F. Supp. 422, an award of $115,000 on plaintiff's decedent's earnings of only $2,600 per year to a widow and two children was sustained.

In *Holder v. Key System,* 88 Cal. App. 2d 925 (1948), 200 P. 2d 98, there was an award of $45,000 for the death of a 56 year old man with a life expectancy of 16.7 years. He earned $180 per month. The widow was 51 years of age. There were two adult children, but they were not dependent upon their father. This remarkable result was achieved by the other firm of attorneys, Ricksen, Freeman & Johnson, who represent this appellant in this area.

Decisions of various other courts are in accord:

In *Fritz v. Pennsylvania R. Co.* (7th Cir. 1950) 185 F. 2d 31, an award of $70,000 to the widow and two children of a railroad conductor under the Federal Employer's Liability Act was sustained.

In *McKee v. Jamestown Baking Co.* (3rd Cir. 1951) 198 F. 2d 551, the 3rd Circuit sustained a verdict of $70,000 to a wife and one child for the death

of a steelworker whose earnings averaged $3200 per year.

In *Thomas v. Conemaugh Black Lick Railroad* (D.C. Pa. 1955), 133 F. Supp. 533, a Federal Employer's Liability Act death case, the jury awarded to the widow and children of a railroad employee $100,000 damages, less the sum of $20,000 because of his contributory negligence, and the trial Court on motion for new trial sustained the award of $80,000.

It is clear that the jury had the right, without resort to damages for conscious pain and suffering, to find for plaintiff in the sum of $75,000, and that upon the record and the authorities the award was a modest one.

II.

RECOVERY FOR CONSCIOUS PAIN AND SUFFERING WAS A SUBMISSIBLE ISSUE UPON THE RECORD AND THE JURY WAS ENTITLED TO AWARD A SUBSTANTIAL SUM THEREFOR, BUT EVEN THOUGH THAT ISSUE WAS NOT SUBMISSIBLE, THAT FACT IN NO WISE RENDERS THE GENERAL VERDICT VULNERABLE TO ATTACK.

1. The evidence established conscious pain and suffering, the Court was authorized to submit that issue, and the jury was entitled to make an award therefor.

Defendant upon this appeal, as it did upon the trial and the motion for new trial, fails to grasp what the proof showed. It glaringly omits from its brief in its statement of the evidence relating to this issue the many significant and decisive aspects of the testimony.

Upon the trial there were introduced large photographs as exhibits portraying the accident, the crushed engine cab, and the physical conditions including dimensions involved. The defendant objected to the introduction of these exhibits—for what reason we are not informed. The trial Court refused to admit them all but did receive a number.

Defendant appears to be unaware of the significance of the fact that deceased was so close to the witness George E. Maasen that he "had come back to my side and stood right in front of me almost on my feet" (TR 32), and that "a steam pipe broke right in front of my [Maasen's] face and burned my face quite badly, my eyes and the side of my ears and neck", and that Maasen, despite being so burned and scalded, was not only able to do the things he thereafter did but survived to testify as a witness on this trial. Defendant ignores the fact that if Maasen could be so burned and so survive that the deceased could likewise have done so. Defendant overlooks the fact that Maasen was knocked out of the window of the cab. (TR 32.)

Defendant overlooks the facts:

That Maasen risked his own life to get the engineer and deceased out of the cab and that after all he had tried to do by himself alone he called upon a man to help him do so. Maasen said "I told him to give me a hand; I have got a fireman, a brakeman and an engineer there in that cab, help me get them out". (TR 33.)

That Maasen could only conceivably risk his own life in order to save that of Heavingham and of the engineer.

That Maasen, serving as fireman and promoted to locomotive engineer, was an expert in the operation and in respect of the structure and make-up of the locomotive and in relation to that which had transpired upon the collision.

That Maasen believed that Heavingham was alive and that he so believed during all the period from the time of the accident to the time he himself was taken away in the ambulance.

The defendant overlooks the decisive feature that in law and in fact Heavingham was alive when last seen and he was believed to be alive and that belief was so certain that for the full lapse of time until he was obliged to give up, Fireman Maasen not only believed but acted upon the assumption that Heavingham's life could be saved if he could but get to him. We submit that the very facts that both Maasen and Heavingham were scalded, that Maasen was thrown out but Heavingham couldn't get away, show that Heavingham's death was of necessity a delayed and an agonizing one.

We submit upon the mere narration of the fact that Heavingham died of "scalding burns over entire body" that his death could not have been and was not instantaneous and that of necessity he sustained conscious pain and suffering.

Of particular interest in this connection is the decision in *Giles v. Chicago Great Western Ry. Co.* (D.C. Minn. 1947) 72 F. Supp. 493, wherein the sum of $6,000 for conscious pain and suffering was held not excessive for the death of a section laborer who, while standing on the cab floor of a locomotive, was scalded in a collision. The Court stated the facts as follows:

> "Arriving at Alta Vista in a blizzard, the locomotive in which Eastman was riding collided with the rear end of said train at 12:11 p.m. on said date. As a result, live steam escaped into the cab, causing Eastman to sustain first, second and third degree burns, covering about sixty per cent of the surface of his body. Despite this, he was able to crawl through the cab window and walk a considerable distance in deep snow to defendant's depot. Here, together with several other injured employees, he reclined on the floor and was given first aid treatment, following which he was removed by ambulance, at about 3:30 p.m. on said date, to St. Joseph's Hospital at New Hampton, Iowa. From the time of the collision up to the time he was admitted to said hospital Eastman was conscious and in great pain. During this time he was constantly requesting drinks of water. He was attended by physicians at the hospital who performed a necessary operation involving debridement and cleaning of the burned areas. This was followed by the application of pressure bandages and medication. Penicillin and morphine were administered. He sustained considerable shock incident to exposure which, together with the serious injuries, caused his death at 6:30 a.m. on January 31, 1947."

There is a presumption by both State and Federal law that Heavingham remained alive from the time that Fireman Maasen last saw him until his death was shown.

In 15 Cal. Jur. 2d, Death, Sec. 2, page 78, it is stated:

> "*Presumption as to continuance of life.* The law presumes that a person once shown to be alive continues to be alive until a different presumption arises."

In *American Sugar Refining Co. v. Ned* (5th Cir. 1954) 209 F. 2d 636, it was held:

> "There is a presumption in favor of continuation of life until the contrary is shown."

In *Occidental Life Ins. Co. v. Thomas* (9 Cir. 1939) 107 F. 2d 876, this Court held:

> "A person who is alive when last seen is presumed to continue living until the contrary is shown."

In the face of these authorities appellant's slur at the presumption in saying in its brief (page 21) "even conceding, arguendo, *some sort of artificial presumption* of a continuation of life, etc." only serves to emphasize its failure to grasp what is involved. In addition to the testimony of Fireman Maasen and the presumption there was introduced in evidence a certified copy of the Death Certificate.

Defendant, at page 22 of its brief, says "the admission of this evidence over this objection was

error" and adds for good measure that "any such inference (of conscious pain and suffering) would be completely nullified by entries in the very same death record". It cites in support a decision which has nothing to do with the subject, *May Department Stores Co. v. Bell.*

Upon the trial and upon the motion for a new trial the authorities establishing the admissibility of this Death Certificate and the right of the jury to select from it those facts which in its view were determinative of the issue were presented. The defendant ignores those decisions also.

This Death Certificate was admissible in evidence by both explicit State and Federal Statutes, 28 U.S.C.A., Section 1732, and State of California H. & S. C., Section 10551.

It was the function of the jury and not even of the Court, leave alone the defendant, to say and determine for itself what the fact was. This it had a right to do in respect of the Death Certificate or any other piece of evidence which was directly conflicting within itself or with some other evidence in the case. Indeed, this function is peculiarly one of the jury in these Federal Employer Liability law cases.

In *Lavender v. Kurn* (1946) 327 U.S. 645, 66 S. Ct. 740, the Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences,

a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusions reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis ours.)

In the very recent decision of *Thomas v. Conemaugh Black Lick Railroad* (DC 1955 PA.) 133 F. Supp. 533, an action like this under the Federal Employer's Liability Act for the death of a railroad employee, an award of $100,000 was reduced to $80,000 by the jury because of the contributory negligence of the deceased and there was presented the same legal proposition as that posed here. The Court there said, page 541:

"In admitting into evidence a Death Certificate and Coroner's Return of View, the court charged as follows:

" 'There is a provision of law that where a certificate of death or a coroner's certificate is offered in evidence, such certificate shall constitute prima facie evidence of its contents, but such certificate is always open to contradiction or explanation by either plaintiff or defendant, regardless of who offered it.

" 'The statements, therefore, which appear in the coroner's or death certificate are not conclusive and binding on either party to this proceeding, but are open to explanation, contradiction or modification, and are only prima facie evidence of the statements contained thereon.'

"Death certificates are admissible under Federal and Pennsylvania Statute. 28 U.S.C.A. § 1732; 35 Pa. P.S. §§ 450.101-450.1003.

"The law is firm to the effect that a death certificate is prima facie evidence of the facts stated therein, but is always open to contradiction by any of the parties regardless who offered it. [Citing many decisions.]

"I am satisfied that the law as enunciated in the court's charge is proper."

Other authorities to like effect are set forth in the annotations entitled "Presumption against suicide as overcome by Death Certificate, Coroner's Verdict, or similar documentary evidence" in 159 A.L.R. at page 181, and in a later annotation appearing in 28 A.L.R. 2d at page 352 entitled "Insurance: Coroner's verdict or report as evidence on issue of suicide".

In the main decision, *Fleetwood v. Pacific Mut. L. Ins. Co.* (Ala. 1945) 21 So. 2d 696, 159 A.L.R. 171 it was held that:

"A death certificate, signed by the coroner and certified by the state registrar of vital statistics, which by statute was made prima facie evidence in all courts and places of the facts therein stated, constituted direct and positive evidence of suicide

> which would prevail over the presumption against suicide, unless the plaintiff went forward with the case and introduced rebuttal evidence admitting of reasonable conflicting inference against suicide."

In *Hamilton v. Metropolitan L. Ins. Co.* (Ga. 1944) 32 S.E. 2d 540, dealing with a statute making Death Certificates prima facie evidence in all Courts and places of the facts therein stated, the Court held:

> "that the circumstantial evidence plus the proper introduction in evidence by the defendant of a certified copy of the death certificate, stating that the cause of death was suicide, made out by the only physician who saw him soon after he arrived at the hospital, and who attended him, made out a prima facie case that the cause of his death was the cause given in the death certificate."

The best evidence of Heavingham's having died an agonizing death are the facts supplied by the testimony of Fireman Maasen and the Certificate of Death. Heavingham was alive when last seen. He was dead and so known to be only when his body was removed from the wreckage, the detail of which the plaintiff did not go into, nor did the defendant supply any evidence upon the subject. This does not militate against the plaintiff, the fact of Heavingham's being alive having been established in the record.

In its endeavor to rule out conscious pain and suffering, appellant omits certain of the evidence from

its statement of facts at pages 4 to 8 inclusive of its Brief and seeks to infer that because Maasen heard no "outcry" or "any sound of a human voice of any kind" (p. 8), that Heavingham met an instantaneous death upon impact.

Appellant omits and overlooks the testimony of Fireman Maasen that

> "Just as I was falling out the window—I didn't want to hit the ground, because it is a long ways down, so I reached up to grab for something, and my hands came in contact with something. About that time I passed out. I don't know when I hit the ground, and I woke up crawling on my hands and knees along the right-of-way right opposite the engine over two more tracks." (TR 32, 33.)

and Fireman Maasen's further testimony

> "Q. In your testimony you referred to the fact the Mallet engine after the accident continued to work steam. Tell us how that operates and what sound, if any, is made, and describe the sound, if any.
>
> A. Well, the only thing the steam operated at that time would be the air pumps, which provides air for the brakes throughout the train, and they are quite loud, that is, the exhaust from them are quite loud when they are operating, and that is the only thing the steam would operate outside of the escaping steam.
>
> Q. That I will speak of in a moment. Now, tell us about the escaping steam and what sound, if any, came from it.
>
> A. Well, it was quite a noise, the steam escaping.

Q. How far away from the egnine were you when you were over at the ambulance which had arrived? Give us a rough estimate of distance.

A. Oh, I should judge it would be around 150 feet.

Q. You testified, and you correct me if I am wrong, that while you were at this ambulance you heard the steam cease.

A. On the way to the ambulance." (TR 67, 68.)

and

"Q. What was the effect, if any, of leaving of the fire having necessarily been left on after the accident; what would happen with that fire in there?

* * * * * * *

The Witness. A. The fire could very easily have caught the engine on fire." (TR 38, 39.)

The enlarged photographs showing the impact and wreckage of this locomotive and the caboose of the train ahead portray much that cannot be expressed in words and are eloquent as to what took place in the accident.

Fireman Maasen risked his life trying to find Heavingham and remove him from the wreckage. He did this on his own, having last seen Heavingham living. Can it now be said that Maasen, who was an expert in his field and so regarded by the Courts, and the best advised of anyone present at the time, as to what the situation and Heavingham's condition was, didn't know what he was doing and that upon a cold

record the defendant in this case can substitute its judgment for what actually occurred?

By the Certificate the death of Heavingham was shown.

Wherever the Certificate was beneficial to plaintiff it supplied affirmative evidence of the fact.

Wherever the Certificate ran into contrary evidence introduced by plaintiff (the defendant produced none it must be remembered), it was for the jury to determine the fact.

Completely destructive of defendant's position that Heavingham's death occurred upon the impact and directly sustaining a finding that in accordance with the physical facts, the testimony of Fireman Maasen, the Death Certificate and the natural result of the scalding did cause decedent to sustain conscious pain and suffering, is the decision in *American Sugar Refining Co. v. Ned,* 209 F. 2d 636, cited supra, the decedent fell from a barge into the water. His body was found several days later and his Death Certificate recited the cause of death as "asphyxia, due to drowning." (p. 637.) The Court held:

> "It is clear from the evidence that the deceased fell from the barge into the water; what caused him to fall is not shown by substantial evidence; it may have been caused by weakness or disease. The fall occurred on the shore side when the barge was several feet from the dock; the decedent was sitting upon a railing on the edge of the barge, and fell directly into the river. The fall by itself did not cause his death. If he had fallen upon the deck and expired immediately, the most

reasonable inference would have been that he had died of natural causes; but he was alive when he fell into the water and dead when his body was found floating in the river several days later. We have the commissioner's findings and evidence of the living man's tumbling into the water, together with other facts and circumstances in the record, which fairly warrant the inference that drowning caused his death."

Sustaining the verdict, the Court said:

"We are urged to hold as a matter of law that a living man who fell from a barge died from disease before he was asphyxiated by river water. Such a holding is not warranted by substantial evidence. There is a presumption in favor of the continuation of life until the contrary is shown. The preponderating evidence to the contrary here is that the man was drowned, which was an efficient, intervening, independent, unintentional, and unexpected event that shortened his life and put an end to his earthly existence. The death was accidental even though the man might have died a few minutes later from natural causes if he had not met with the accident."

Completely dispositive and conclusively so of the entire issue of conscious pain and suffering is the decision of this Court in *Hutchison v. Pacific-Atlantic Steamship Co.* (9 Cir 1954) 217 F. 2d 384, handed down on the very day that this case was submitted to the jury.

In that case a seaman disappeared. Six days later his body was found at the bottom of an uncovered and unlighted ventilator shaft.

The autopsy disclosed his death was caused by a fractured skull. The trial Court directed a verdict against the plaintiff on the issue of pain and suffering, holding that the evidence was insufficient to sustain a finding therefor.

Reversing, this Court, speaking through Judge Orr, held that the issue was for the jury, saying:

> "In our view this evidence was sufficient to require submission to the jury of the cause of action for pain and suffering of the deceased. Cf. St. Louis I. M. & S. R. Co. v. Craft, 1915, 237 U.S. 648, 35 S.Ct. 704, 59 L.Ed. 1160. Its weight and credibility was for the jury to consider." (page 385.)

2. Appellant in its brief (pp. 21, 22) speculates as to whether Heavingham could have been killed on impact, etc.

This, as in the case of damages, was not a subject for the appellant to speculate about.

This issue was for the fact-finding body, the jury, to determine. So the United States Supreme Court has held in *Lavender v. Kurn,* supra.

We have a much more precise delineation of fact and circumstance by the proof in this case than was present in *Lavender v. Kurn.* We have an eyewitness and the physical facts to sustain our position. In *Lavender v. Kurn,* a switch tender, while in the performance of his duties, was killed.

His death was due to a fracture of the skull by "some fast-moving small, round object." It was plaintiff's theory that one of the carriers was negligent in permitting a mail hook or other object to

swing out from the side of one of its backing trains and strike the plaintiff, inflicting this injury.

There was evidence that it would be physically and mathematically impossible for this to have occurred. There was some evidence from which it might reasonably be inferred that decedent had been murdered.

Though there was evidence which negatived the hypothesis that decedent had been struck by the mail hook, the Supreme Court concluded that the inference that he was "killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury."

The Supreme Court held the evidence sufficient to make a jury issue and reversed the Supreme Court of Missouri which had held to the contrary.

Completely dispelling any notion that the Supreme Court has, by reason of change of personnel or otherwise, receded from or watered down its views expressed since 1943 in FELA cases—a notion sometimes urged by the defense in these cases and one which seems to pervade appellant's thinking here, are the decisions of that Court previously here reviewed in *Neese v. Southern Railway Company* (1955) 76 S.Ct. 131, in *Snyder v. U. S.* (4 Cir. 1954) (D.C.Md.), 118 F. Supp. 585, 218 F. 2d 266, and *U. S. v. Union Trust Co.* and *Union Trust Co. v. Eastern Air Lines, Inc.* (1953) 113 F. Supp. 80 (D.C. Cir. 1955) 221 F. 2d 62, handed down December 5, 1955; and in the additional decisions of *Swafford v. Atlantic Coast Line Railroad Company* (Oct. 1955) 76 S.Ct. 80, summa-

rily reversing the 5th Circuit Court of Appeals in 220 F. 2d 901 (1955) wherein that Court had reversed the judgment in favor of plaintiff "with directions to enter a judgment for the defendant"; and in *Anderson v. Atlantic Coast Line Railroad Company* and *Atlantic Coast Line Railroad Company v. Anderson* (Oct. 1955) 76 S.Ct. 60 in which the Supreme Court again summarily reversed the decision of the 5th Circuit Court of Appeals in 221 F. 2d 548, wherein that Court had reversed a judgment for the death of a railroad conductor "with directions to enter final judgment for the defendant"; and in *Strickland v. Seaboard Air Line Railroad Company* (1955) 76 S.Ct. 157, reversing the decision of the Supreme Court of Florida in 80 So. 2d 914.

It is of especial interest that the reversal by the Supreme Court was upon the authority of the *Bailey* case. The Per Curiam decision reads:

> "The petition for writ of certiorari is granted and the judgment is reversed. Bailey v. Central Vermont R. Co., 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444."

The decisions of the Supreme Court in each case were "Per Curiam. The petition for writ of certiorari is granted and the judgment is reversed."

It is, we think, reasonably clear that appellant is under a gross misapprehension in the premises.

3. It was not reversible error for the Court to submit the issue of conscious pain and suffering to the jury even though it be assumed that such issue was not submissible.

It is settled law in the California courts and in the Federal courts that this is so. Indeed, this defendant, through its present counsel, has in the past been instrumental in making much of the law through asserting abortively the very claims it now makes here.

The general verdict of the jury where there is substantial evidence to sustain it upon any count cannot be impeached upon the ground that there is not evidence to sustain an issue submitted to it.

The cases are of two groups: those relating to the submission of an element of damages and those relating to the submission of an element of negligence.

In both instances the state and federal courts have categorically rejected the contention made by the defendant here.

Twenty years ago this defendant, through its present counsel, urged the precise claim it makes here.

This was in the case of *Walton v. Southern Pacific Co.* (1935) 8 Cal. App. 2d 290, 48 P. 2d 108, cert. den. 296 U.S. 647, 56 S.Ct. 308, 80 L.Ed. 461, rehearing den. 296 U.S. 665, 56 S.Ct. 380, 80 L.Ed. 474.

There this defendant, through its present counsel, sought a reversal in a wrongful death action under the Federal Employers' Liability Act and the Federal Boiler Inspection Act for the death of a railroad employee. The Court there said:

> "It is settled that where suit is brought upon two different theories, if there is evidence suffi-

cient to sustain either of them and the verdict of the jury be a general one, the general verdict will stand, as it imports an implied finding (in a case such as this), that the Boiler Inspection Act was violated in that the engine had a leaky throttle. Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653; Merrill v. Kohlberg, 29 Cal. App. 382, 155 P. 824; 24 Cal. Jur. 885, 6."

As late as 1950 this same defendant, through the same attorneys, made a like contention in the case of *McNulty v. Southern Pac. Co.* (1950) 96 Cal. App. 2d 841, 216 P. 2d 534. There plaintiff's judgment for $100,000 damages was sustained by the District Court of Appeal and the Supreme Court of California.

This was an action for personal injuries wherein plaintiff was thrown from a train and lost both legs. Plaintiff was 42 years of age and was receiving from his employer, American Trust Company, $365 a month. His employer continued to pay him through his hospitalization and recovery. He was making more money at the time of the trial than he had been at the time of the accident. This appellant, through its present counsel, there contended that the verdict was excessive and the result of caprice (p. 537).

Particularly important and apropos here, however, is the fact that appellant there claimed it was error to refuse to instruct the jury that "there is no evidence in this case that there was any negligence or carelessness on the part of defendant, Southern Pacific Company, in supplying and maintaining sufficient

and adequate lighting facilities at the point of accident."

Rejecting this contention, the Court said (pp. 542, 543):

> "The situation falls squarely within the rule that '* * * a plaintiff may rely upon any one of the alleged acts of negligence as the proximate cause of his injury * * *. Accordingly, where several acts are pleaded, a general verdict for the plaintiff will not be set aside for want of evidence to support it if there is sufficient evidence of negligence to justify it upon one of the issues * * *.' 19 Cal. Jur. p. 675."

In *Edgington v. Southern Pac. Co.* (1936) 12 Cal. App. 2d 200, 55 P. 2d 553, it was said:

> "Moreover, the pleadings, the evidence, the instructions proposed by defendant and given by the court, and the interrogatories embodied in the special verdicts, all show that the case was tried upon the theory that all three federal acts were involved; and it is well settled that where an action is based on the alleged violation of several statutes, and a general verdict is rendered in favor of the plaintiff, such verdict will be sustained if it appears that any one of said statutes was violated. Walton v. Southern Pacific Co. (Cal. App.) 48 P. (2d) 108.
>
> The judgment is therefore affirmed."

In *King v. Shumacher* (1939) 32 Cal. App. 2d 172, 89 P. 2d 466, cert. den. 308 U.S. 593, 60 S.Ct. 123, 84 L.Ed. 496, the defendant, unlike the appellant

here, forthrightly admitted that the law was contrary to its contention. The Court said:

> "Defendants (in their supplemental points and authorities) concede that the Walton case 'is squarely against' the position they have taken on this point, but they contend that the portion of the decision above quoted 'is clearly wrong on principle'; and in a later brief they cite cases which they claim support their view. We have found nothing in any of those cases, nor in the arguments advanced by defendants in connection therewith to warrant the conclusion that the doctrine quoted from the Walton case is not the settled law of this state in this class of cases; and the authorities are abundant showing that it is."

It thus appears whether the issues here are regarded as having been stated in one count or in separate counts is immaterial and the rule of law is the same.

In *O'Donnell v. Elgin, J. & E. Ry. Co.* (1949) 338 U.S. 384, 70 S.Ct. 200, the Supreme Court in an opinion by Justice Jackson held that "where the complaint mingled in a single count or cause of action charges of general negligence and a specific charge that defendant 'carelessly and negligently' violated the Safety Appliance Act, 45 U.S.C. § 2, 45 U.S.C.A. § 2, by operating a car not equipped with the prescribed coupler" the *pleading and the proof were sufficient to sustain the resulting judgment on one ground only,* i.e., the violation of the Boiler Inspection Act. The opinion cited in the footnote the following:

"Professor Moore, in discussing this Rule with reference to claims based upon both common law and statutory grounds, states: 'Separate statement by way of counts is not required; separate paragraphing in setting out the grounds in the above actions is desirable and required.' 2 Moore's Federal Practice, 2006-2007 (2 ed. 1948)."

The Federal Court Rule is further stated in the following cases:

Cross v. Ryan (7 Cir. Ill., 1942), 124 F. 2d 883, cert. den. 316 U.S. 682, 62 S.Ct. 1269, 86 L.Ed. 1755;

Miller v. Advance Transp. Co. (7 Cir., Ill., 1942), cert. den. 126 F. 2d 442, 446, 317 U.S. 641, 63 S.Ct. 32, 87 L.Ed. 516;

Larson v. Chicago & N.W.R. Co. (7 Cir., 1948) 171 F. 2d 841, 844.

In *Larson v. Chicago & N.W.R. Co.,* supra, the Court said:

"It also argues that the remaining charge of negligence was based not upon the Federal Empolyers' Liability Act but upon an alleged contract violation which by necessity required allegation and proof of due care on the part of plaintiff. And the point is made that there was neither allegation nor proof. We need not consider the second contention as it is apparent that there was reasonable basis for concluding, in support of the jury's verdict, that defendant was negligent by its act of attaching the pusher engine to the rear of the caboose."

Kinser v. Riss & Co. (7 Cir., 1949), 177 F. 2d 316, 317.

The rule is no different as to damages.

In *Moss v. Coca Cola Bottling Co.,* 103 C.A. 2d 380, 229 Pac. 2d 802, it was held:

> "Defendant contends that the cause of action for breach of warranty is fatally defective in that plaintiff failed to give defendant reasonable notice of the breach. Since we have concluded that there is sufficient evidence to sustain the verdict and judgment for plaintiff on the negligence count, it is unnecessary to discuss the alleged defects in respect of the second count for breach of warranty. As noted above, the jury returned a general verdict for plaintiff. As stated in Shields v. Oxnard Harbor District, 46 Cal. App. 2d 477, 491, 116 P. 2d 121, 130: 'A general verdict imports findings in favor of the prevailing party on all material issues and, if there is substantial evidence to sustain a verdict on one count which is unaffected by error, the fact that there is not sufficient evidence to sustain the necessary findings of fact upon another count to support a verdict, or that there have been errors in connection with such other count, will not justify a reversal of the general verdict. Hume v. Fresno Irr. Dist., 21 Cal. App. 2d 348, 356, 69 P. 2d 483; King v. Schumacher, 32 Cal. App. 2d 172 (173), 179, 89 P. 2d 466; see also 2 Cal. Jur. (1921) 1029.' "

The rule is no different in respect of an element of damages as compared with an element or charge of negligence.

In *Walling v. Kimball,* 17 Cal. 2d 364, 110 P. 2d 58, it was held:

> "Presumption was that verdict for husband was for general damages for husband's personal injuries alone to exclusion of special damages for expense of treating wife also injured in same automobile collision, particularly where husband's injuries would sustain verdict for amount awarded and verdict for wife would otherwise be excessive under statute to amount of special damages allowed husband."

In *Staub v. Muller* (1936), 7 Cal. 2d 221, 60 P. 2d 283, it was held:

> "Any uncertainty in lump-sum findings of amount of damages will be construed so as to support judgment rather than defeat it."

In *Stewart v. San Fernando Refining Co.* (1937), 22 Cal. App. 2d 661, 71 P. 2d 1118, it was held:

> "On appeal from judgment for plaintiff, reviewing Court would not presume that jury awarded damages as to items which were not supported by a preponderance of evidence in favor of plaintiff."

In direct and categorical rejection of appellant's claim (even assuming there had been no evidence respecting conscious pain and suffering) that the Court erred in failing to give Defendant's Instruction No. 9, "I instruct you that under the evidence in this case you may not include in your award any sum for conscious pain and suffering by the decedent", Appellant's Brief, page 12, is the rule stated in 16 Am. Jur., Death, § 363, page 240, in which it is said:

> "Thus, where the court has fairly and fully given to the jury the general rule as to the measure and elements of damages for wrongful death and the matters proper to be considered, a refusal to charge that in estimating damages the jury should not allow anything for the pain and suffering of the decedent, or as exemplary damages, is not erroneous."

Likewise categorically rejecting its claim respecting submission of the issue is the statement in the same volume of American Jurisprudence under the same subject, Section 364, page 241, in which it is stated:

> "These rules are applicable in regard to an instruction to a jury to allow damages for pain suffered by one killed by another's negligence, if any is shown by the record, although the evidence shows instant death, where there is no evidence of pain and where it must be presumed that the jury did not allow anything for it."

The precise point is covered by the decision of the Supreme Court of California in *Gilmore v. Los Angeles Ry. Corporation* (1930) 211 Cal. 192, 295 Pac. 41, where the action was by the widow to recover for the alleged wrongful death of her husband.

Defendant contended that the deceased was guilty of contributory negligence as a matter of law. Defendant contended (p. 44) that the instructions of the Court submitted to the jury gave "substantial damages to the nonparticipating heirs at law of the decedent" and that this constituted reversible error. Categorically rejecting this contention the Court said:

> "The instructions complained of carried the rights of the widow and children along together but in the disjunctive where necessary for the individual consideration of their claims, and we can see no error in giving them in that form. *If pecuniary loss or loss of support was not shown as to certain of the heirs, it is to be presumed that no award was made in that behalf.* The instructions in mentioning the various heirs, carried their rights together, as above stated, and the words, 'If any', were frequently inserted, thus showing that the court placed before the jury only such matters as the evidence warranted and kept the jury within the proper limits." (p. 45.) (Emphasis ours.)

With respect to appellant's final effort to bolster its position by claims that what is involved here is one of "federal procedure" and that in that connection the decision of *McCandless v. United States* (p. 31 of its Brief) and kindred decisions are applicable, we shall point out that these claims also are without foundation.

Preliminarily, it is difficult to understand how there was a federal procedure peculiar to the points raised by appellant when, as stated in *Toledo, St. L. & W. R. Co. v. Reardon* (1908 Ohio) 159 F. 326, "prior to the rules the form and effect of verdicts in actions at law were matters in which the federal courts followed the procedure of the state courts".

Apparently appellant is unaware of Rules of Civil Procedure, Rule 61 directly applicable to verdicts and to trial Courts. Also, that Rule 61 "should be heeded

by appellate court to be effective", as stated in *University City v. Home Fire Marine Ins. Co.* (8 Cir. 1940) 114 F. 2d 288, and in the light of what is said by Chief Judge Gardner, speaking for the 8th Circuit in *Commercial Credit Corp. v. United States* (8 Cir. 1949) 175 F. 2d 905, 908, that no error is ground for reversal unless it be prejudicial, and stating:

> "Error is not ground for reversal unless it be prejudicial. It is a well settled rule of appellate procedure that in order to warrant a reversal the error complained of must have been prejudicial to the substantial rights of the appellant."

Appellant fails to mention that the *McCandless* case is in conflict and directly contrary to the later decision of the Supreme Court in *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, 144 ALR 719.

In *Kansas City S. R. Co. v. Leslie* (1915) 238 U. S. 599, 35 S. Ct. 844, 59 L. Ed. 1478, a death action under the Federal Employers Liability Act for the loss to the widow and child and also for conscious pain and suffering, the Supreme Court held:

> "It is said the court below erred in approving the charge permitting recovery for pecuniary loss to widow and child and also for conscious pain and suffering endured by deceased in the brief period—less than two hours—between injury and his death. This point having been considered, the right to recover for both these reasons in one suit was recently sustained. * * *
>
> "It is further objected that as the declaration set up two distinct and independent liabilities springing from one wrong, but based upon differ-

ent principles, the jury should have been directed to specify in their verdict the amount awarded, if any, in respect of each. This objection must be overruled. Of course, in causes arising under this statute trial courts should point out applicable principles with painstaking care and diligently exercise their full powers to prevent unjust results; but its language does not expressly require the jury to report what was assessed by them on account of each distinct liability, and in view of the prevailing contrary practice in similar proceedings we cannot say that a provision to that effect is necessarily implied. *As the challenged verdict seems in harmony with local practice and has been approved by the courts below, the judgment thereon is not open to attack here upon the ground specified.*" (Emphasis added.)

We respectfully submit that the judgment appealed from should be affirmed.

Dated, San Francisco, California,
December 15, 1955.

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